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IN THE

Supreme Court of the United States.

October Term, 1954.

No. .

McLOUTH STEEL CORPORATION,
Plaintiff,

v.

MESTA MACHINE COMPANY,
Defendant,

and

J. M. FOSTER AND J. H. JOHNSON, AS INDIVIDUALS AND AS PARTNERS TRADING AS J. M. FOSTER & CO.,
Defendants and Third-Party Plaintiffs,
(Respondent)

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Third-Party Defendant-Appellant,
(Petitioner)

and

LANDIS TOOL COMPANY,
Third-Party Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Hartford Accident and Indemnity Company, by its attorneys, prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Third Circuit entered in the above entitled matter.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 116 Fed. Sup. 689. The opinion of the United States Court of Appeals for the Third Circuit is not yet reported.

JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on June 23, 1954. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A. 1254.

QUESTIONS PRESENTED.

1. Does not the decision of the Court of Appeals for the Third Circuit, which held that a provision in a liability insurance policy, excluding from coverage property in the care, custody or control of the insured, was inapplicable, although the trial court found as fact that the damaged property was in the "physical control" of the insured at the time it was damaged, conflict with applicable state law?

STATEMENT OF THE CASE.

This action was brought by plaintiff, McLouth Steel Corporation (6a), to recover for damage done to a roll grinder which was dropped while being installed in McLouth's plant at Trenton, Michigan. McLouth sued Mesta Machine Company and J. M. Foster and J. H. Johnson, individually and as partners trading as J. M. Foster & Co., as original defendants. McLouth's claim against Mesta was for breach of Mesta's contract with McLouth to install the roll grinder and for negligence in carrying out the installation. Mesta had subcontracted the installation work to Foster, and McLouth in its claim against Foster alleged negligence in performance of the work.

Mesta in its answer cross-claimed over against Foster upon a provision in the subcontract between them by which

Foster agreed to indemnify Mesta against liability arising out of the performance of the work. Foster then brought in two third-party defendants, Landis Tool Company and Hartford Accident and Indemnity Company. Landis had manufactured the roll grinder, sold it to McLouth, and, in accordance with the contract of sale, had furnished an expert to work with Foster in the installation. Foster alleged that Landis's expert, not Foster, was in charge of the work and was responsible for the accident. Foster's claim against Hartford was based upon a comprehensive bodily injury and property damage policy with a property damage limit of $50,000., whereby Hartford agreed with Foster "To pay on behalf of the Insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." In its Answer to Foster's Third-Party Complaint (4a), Hartford averred that the roll grinder at the time of the accident was in the care, custody or control of Foster and that, therefore, any liability of Foster was specifically excluded from the coverage of the insurance policy by Exclusion (d) (2) thereof providing:

> "This policy does not apply (13a):
>
> (d) under coverage B, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property *in the care, custody or control* of the insured • • •" (Emphasis supplied.)

The case was tried before Chief Judge Kirkpatrick, sitting without a jury, who found (20a):

(1) that the roll grinder was damaged to the extent of $57,430.62;

(2) that the roll grinder was in the control of Foster at the time of the accident and was damaged through the negligence of Foster;

(3) that there was no proof of negligence on the part of Mesta;

(4) that Landis, through its expert, was present merely in an advisory capacity and not in control to an extent to render it liable for the accident; and

(5) that notwithstanding Foster's control of the damaged property and the exclusion in its policy with Hartford for injury to property so situated, the policy must be construed to cover Foster's liability in the accident.

The following judgments were accordingly entered (28a):

(1) In favor of McLouth, plaintiff, against Mesta, defendant, in the sum of $57,430.62, plus interest thereon from May 23, 1950 to the entry of judgment of $11,744.07, or the total sum of $69,174.69 for breach of Mesta's contract to install the roll grinder.

(2) In favor of McLouth, plaintiff, against Foster, defendant, in the amount of $69,174.69 for the negligence of Foster resulting in the damage to McLuth's property.

(3) In favor of Mesta in its cross-claim over and against Foster in the amount of $69,174.69 on the indemnity provision of the agreement between them to the extent paid by Mesta to McLouth.

(4) Against Foster, third-party plaintiff, and in favor of Landis, third-party defendant.

(5) In favor of Foster, third-party plaintiff, against Hartford, third-party defendant, in the amount of $50,000., plus interest in the amount of $10,250.,

plus all costs for which Foster is liable in the action, plus Foster's own expenses in the litigation, plus Foster's attorney's fees in the litigation.

Hartford filed motions for judgment n. o. v. or in the alternative for a new trial (26a). Both motions were dismissed by the trial court and Hartford appealed to the Court of Appeals for the Third Circuit. The decision of the District Court was affirmed by a divided court. A dissenting opinion was filed by Judge McLaughlin. The majority opinion held that the case was controlled by the law of Illinois and, because of the decision of an Appellate Court of Illinois in *Welborn v. Illinois Nat. Cas. Co.*, 347 Ill. App. 65, 106 N. E. 2d 142 (1952), that the Supreme Court of Illinois would have reached the same conclusion under the facts of the instant case. The majority held that the exclusion in a liability insurance policy of property in the care, custody or control of the insured applied only to property in which the insured had a proprietary interest. The dissenting opinion held that the *Welborn* case had no application to the instant case and, under the decision of the Circuit Court for the Second Circuit in *Hardware Mutual Casualty Co. v. Mason-Moore-Tracey, Inc.*, 194 F. 2d 173 (1952), as well as under the general law evidenced by decisions of many State Supreme Courts, the judgment entered against Hartford should be reversed.

The original federal jurisdiction was invoked on the basis of diversity of citizenship, Act of June 25, 1948, C. 646, 62 Stat. 930.

ARGUMENT.

1. Preliminary Statement.

Despite the multiplicity of parties and the various conflicting claims which confronted the court below, Hartford's appeal presented to the Court of Appeals only the single issue of whether the trial court erred in holding that the liability of Foster was covered by its liability policy with Hartford. The trial court found "that the accident was caused by Foster's negligence" and that the damaged property was at the time of the accident "physically in Foster's 'control'." Specifically excluded from coverage in the policy was Foster's liability for injury to or destruction of "property in the care, custody or control of the insured."

The court below held that this exclusion did not apply to this particular accident. In so doing, we submit the Court of Appeals failed to give effect to the plain, unambiguous language of the policy, followed a decision which is not controlling in this case and departed from principles of construction laid down in a great many well-reasoned cases, particularly *Hardware Mutual Casualty Co. v. Mason-Moore-Tracey, Inc.*, (C. A. 2, 1952) 194 F. 2d 173.

2. The Applicable Law.

Both the trial court and the Court of Appeals have determined that this case is controlled by the law of Illinois, since the contract of insurance was countersigned in that state. It is submitted that in applying Illinois law both courts erroneously concluded that the decision of an Appellate Court of Illinois in *Welborn v. Illinois Nat. Cas. Co.*, 347 Ill. App. 65, 106 N. E. 2d 142 (1952), was decisive in the determination of the instant case. Petitioner proposes to demonstrate that the *Welborn* case is inapplicable to the facts of the case at bar, and is in conflict with the applicable law of Illinois as determined by the Supreme Court of that state.

In the *Welborn* case suit was brought by the insured garage owner against the insurance company for loss occasioned to a customer's automobile while being repaired by the insured. The insurance company denied coverage on the ground that the insured was "in charge of" the automobile when the damage arose and the loss therefore was excluded from coverage. The court allowed recovery against the insurance company.

It is noteworthy that the policy involved in the *Welborn* case was a garage owner's liability policy, not a contractor's liability policy, as is involved in the instant case. The insuring clause of the policy construed in the *Welborn* case provided that the insurance company would pay such sums as the insured may become liable to pay because of liability arising out of "The ownership, maintenance, occupation, or use of the premises herein designated, including the public ways immediately adjoining, for the purpose of an automobile dealer or repair shop, and all operations either *on the premises* or elsewhere which are necessary and incidental thereto, *including repairs of automobiles* or their parts and ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the ownership, maintenance, or use of any automobile for any purpose in connection with the above defined operations, and also for pleasure use." (Emphasis by the Illinois Appellate Court.) The policy also included an exclusion as follows: "This policy does not apply: Under Coverage B, to property owned by, rented to, in charge of, or transported by the Insured."

Petitioner contends that the *Welborn* case is not controlling in that (1) it was the construction of a garage liability policy and not of a contractor's liability policy, and (2) the decision was solely based on the fact that there was a direct conflict between the insuring clause and the exclusion clause. In its opinion the court stated:

> "The precise wording of the general exclusion provision appears to be in *direct conflict* with the *spe-*

> *cifically defined* operations which are declared covered. For example, it excludes property owned by the insured, while the specific coverage includes ownership of an automobile, used in other operations and even for pleasure use. (Emphasis added.)
>
> Appellant relies upon the exclusion of property 'in charge of' the insured. We note that the policy purports to cover liability arising out of the repair of an automobile, expressly includes operations *on the premises.* We agree with appellant that, when a car is on the premises undergoing repairs, it is in charge of the insured in some sense of the words. Thus, it again appears that the exclusion conflicts with defined coverage." (Italics by the Court.)

It is apparent from even a casual reading of these two pargaraphs that the decision in the *Welborn* case is based upon what the court found to be a direct and clear conflict between the insuring and exclusion clauses. Accepting that construction, the insuring clause *specifically* enumerated the various types of liability assumed by the insurer, including "all operations • • • on the premises • • • including repairs of automobiles • • •." The exclusion clause excluded in general language property "owned by, rented to in charge of, or transported by the Insured." This case stands only for the proposition that a risk specifically assumed may not at the same time be excluded from coverage. The *Welborn* case did not establish an inflexible construction of the words "in charge of" to be applied in all instances, and certainly does not control the construction of the words "care, custody or control" as used in the present policy.

The material portions of the insurance contract between Hartford and Foster provided that Hartford agreed under Coverage B:

> "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as

damages because of injury to or destruction of property, including the loss of use thereof, caused by accident. * * *

"This policy does not apply: * * * (d) under Coverage B, to injury to or destruction of (1) property owned, occupied, or used by or rented to the Insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, *property in the care, custody or control of the Insured,* or (3) any goods or products manufactured, sold, handled or distributed, or premises alienated by the named Insured, or work completed by or for the named Insured, out of which the accident arises; * * *" (Emphasis added.)

In the insuring clause in the policy involved in the instant case the insurer in very general language agreed "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." Exclusion clause (d) in specific language excluded from the coverage of the policy" (d) under coverage B, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, *property in the care, custody or control of the Insured* * * * (Emphasis supplied.) This is a specific limitation upon a general obligation assumed by the insured and the rule of the *Welborn* case, i.e., that a risk specifically assumed may not be excluded, does not apply.

If the court below is correct that the words "care, custody or control" as used in this policy were limited to a proprietary interest in the insured, then the second exclusion under (d) is completely meaningless and ineffective. A proprietary interest implies, at the very least, a right to exclusive possession for a stated time. If this were the

situation, liability will be excluded under the first section of (d) and there would be no need to consider the second section. The fact that the parties saw fit to exclude both (1) property owned, occupied, used by or rented to the insured, and also (2) property in the care, custody or control of the insured makes it quite clear that they intended to exclude not only property owned by the insured or in which he has some right "akin to ownership," but also property where there is a mere naked possession with no ownership or proprietary right in the insured.

Black's Law Dictionary, 3rd Ed., defines "care", "custody" and "control" as follows:

> Care—"attention, oversight, management (p. 280).
>
> Custody—"The care and keeping of anything" (p. 492).
>
> Control—"Power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee" (p. 428).

In the bare definitions of the words there is not a suggestion that proprietary interest is a necessary or implied incident of care, custody or control.

It is submitted that once it was determined that the roll grinder was in the control of Foster at the time the accident occurred the court was then bound to conclude under the plain and unambiguous provisions of the policy, which excluded property in the care, custody or control of the insured, that Hartford was not liable to Foster as the result of this accident.

The majority opinion of the Court of Appeals recognized that the policy involved in the *Welborn* case was a garage owner's liability policy rather than a contractor's liability policy, as is involved in the instant case. Without any examination of the real basis of the decision in the *Welborn* case, i.e., a clear conflict between specifically defined coverage and a general exclusion of property "in

charge of the insured", which conflict is entirely absent in the instant case, the majority opinion stated:

> "We think the Illinois court would have reasoned the same way and would have reached the same conclusion had the present contract and circumstances been before it."

Therefore, while the court impliedly recognized that the *Welborn* decision was the construction of a particular policy and did not establish a general principle of law, it, nevertheless, concluded that, if the instant case had been presented to the Illinois court, it would have reached the same result in spite of the basic and fundamental differences between the two insurance policies. It is submitted that the Court of Appeals was not justified under Illinois law in arriving at this conclusion. There is no Illinois case which has construed an insurance policy similar or analogous to the policy involved in the instant case. In the absence of such a decision, it was error for the Court of Appeals to assume the future development of Illinois law as it has in the majority opinion. Until the Illinois courts have judicially determined the construction of a policy which assumes a general liability with a specific exclusion of property in the care, custody or control of the insured, it is submitted that the general principles of Illinois law established in the cases cited subsequently in this brief, to the effect that where language used in an insurance policy is clear and unambiguous, it must be taken and understood in its plain, ordinary and popular sense. These authorities require giving effect to the exclusion set forth in the instant insurance policy, where there is a finding by the trial court that the damaged property was in the physical control of the insured. In order to eliminate any doubt of the conclusion of the court that it erroneously regarded the *Welborn* case as decisive in the determination of the instant case, the court stated:

> "In the present case, though a rational argument can be made for a different result, we recognize our obligation to follow and apply the law of Illinois as declared in the *Welborn* case."

It is submitted that, in view of the complete divergence between the insurance policies involved in the two cases, the decision of the Appellate Court of Illinois in the *Welborn* case cannot in any respect be considered as controlling authority.

The Illinois law which is applicable to this case was determined by the Supreme Court of Illinois in *Zitnick v. Burick*, 395 Ill. 182, 69 N. E. 2d 888 (1946); *Dempsey v. National Life & Accident Ins. Co.*, 404 Ill. 423, 88 N. E. 2d 874 (1949) and *Lentin v. Continental Assurance Company*, 412 Ill. 158, 105 N. E. 2d 735 (1952), which hold that where language used in an insurance policy is clear and unambiguous it must be taken and understood in its plain, ordinary and popular sense, and that a court may not inject terms and conditions different from those agreed upon. Applying that rule to the facts of this case, the parties agreed that the policy should not apply to property in the care, custody or control of the insured, and the plain, ordinary and popular understanding of those words clearly encompasses the situation where Foster's employees were, as the trial court found, in physical control of the roll grinder at the time it was damaged.

In his dissenting opinion, Judge McLaughlin ably stated the position urged by petitioners herein as follows:

> "No time need be spent in endeavoring to prove or disprove that the Welborn decision is to be accepted as the law of Illinois. Assuming that it is the case has no application here." • • •
>
> "The Welborn principle that explicit coverage cannot be avoided by later general exclusion does not solve our problem. What we have is a policy that starts off with a general statement of coverage and

then follows with certain carefully stated exceptions. There is no ambiguity about the document in whole or in part. The Illinois law on that sort of policy language is in accord with the firmly settled doctrine that it must be construed as it plainly reads." • • •

"There is nothing mysterious about the policy in suit. The insured received what it paid for. If it had desired further protection it could have readily obtained that for a further commensurate premium. The policy is the insured's contract, clear on its face. The coverage now sought was distinctly eliminated from the agreement the insured purchased because that kind of insurance was not included for the premium paid."

It is submitted further that the case at bar is in conflict with the well-reasoned recent decision in *Hardware Mutual Casualty Co. v. Mason-Moore-Tracy, Inc.*, 194 F. (2d) 173 (C. A. 2d 1952), an opinion written by Judge Augustus Hand. The facts bear such striking similarity to the present case as to warrant their full statement.

Defendant Mason-Moore-Tracy, Inc., hereafter referred to as Mason, was engaged in the business of moving machinery and equipment, including rigging operations. The plaintiff had issued an insurance policy to Mason. Judge Hand described the policy and its provisions as follows:

" 'Coverage B. Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed • • • by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the hazards hereinafter defined'.

"The hazards referred to are defined in Division 1(a) as all operations during the policy period which

are necessary or incidental to the ownership, maintenance or use of the premises. Under the heading of 'Exclusions' the policy provided as follows:

> "'This policy does not apply: * * * (i) under Coverage B, with respect to Division 1 * * * of the Definition of Hazards, to injury to or destruction of property owned, rented, occupied or used by or *in the care, custody or control* of the insured'." (Emphasis supplied.)

Mason contracted with one Stewart to move certain carpet cleaning machinery. This was being done by suspending the equipment within an elevator, in the premises, by means of a rope attached at the top of the elevator shaft. While the equipment was so secured, the elevator began to move, causing the rope to break. The equipment struck the elevator floor, causing the elevator in turn to descend to the bottom of the shaft. Damage to the elevator resulted from the impact. Suit was brought against Stewart and Mason by the owner of the building for damage to the elevator, and by tenants for damages resulting from loss of use of the elevator. These claims were settled, with Mason paying $1,300. as its share of the damage. Mason subsequently brought suit against its insurer to recover the $1,300. and also $6,250. which it had paid to its attorneys for defending the action brought by the owner and tenants.

The insurer thereafter brought suit for a declaratory judgment to relieve it of liability under its policy. The lower court entered judgment for the insurer. On appeal this was affirmed.

Mason contended that the loss was occasioned out of an operation which fell within the definition of Hazards; that, further, since it did not have "control" of the building, the exclusion was inapplicable. In answering this contention Judge Hand said (p. 175):

> "But the exclusion clause requires only that the insured be in control of the property actually injured,

i.e., the elevator * * * The exclusion clause is applicable whether Mason's use was exclusive or in conjunction with Stewart and The Maintenance Company."

The language of Judge Hand in the Hardware Mutual Casualty Company case is equally applicable to the instant case. This case is not only recent and decided by a highly respected court, but also represents the general law as evidenced by many decisions throughout the country.

3. The Exclusion in the Policy Has Been Held Applicable in Similar Circumstances in Numerous Cases.

We have demonstrated what we sincerely believe to be the error of the court below in construing Foster's policy with Hartford to cover Foster's liability in the case on the authority of an Illinois decision which is not controlling or applicable here. Many decisions of various jurisdictions support our position.

In *Speirs & Co. v. Underwriters at Lloyds,* Cal. App. 2d 603, 191 P. 2d 124 (1948), the exclusion involved was of liability arising out of "ownership, operation, maintenance or *control* of any * * * motor vehicle." (Emphasis supplied.) The court quoted from *Rose v. Union Gas & Oil Co.,* 297 F. 16, 18, C. C. A. 6 (1924), as follows: "The word 'control' does not import an absolute or even qualified ownership. On the contrary it is synonymous with superintendence, management, or authority to direct, restrict or regulate." The court then held that a truck in the course of being repaired by the insured was in its "control" within the meaning of the exclusion and denied recovery.

A similar problem of construction was before the court in *State Automobile Mut. Ins. Co. v. Connable-Joest, Inc.,* 171 Tenn. 377, 125 S. W. 2d 490 (1939). The exclusion there involved was property "in charge of" the insured. The court said: "It is contended by counsel for plaintiff that the phrase 'in charge of' is synonymous with the associated

words 'owned, rented, leased, * * * or transported,' contained in the exclusions clause, and was intended to distinguish claims for damages to customers' automobiles from damages to automobiles in charge of the insured by reason of ownership, lease, rental, or while being transported by the insured. The construction contended for would do violence to the plain and unambiguous language of the contract. * * * The intent of the parties, as ascertained from the contract, was to exclude the insurance company from liability for claims for damage to property under the control and management of the insured, whether by virtue of ownership, lease, rental, or having charge of the property under any other authority, or in any other capacity." The court then held that plaintiff's insurance policy excluded liability for damages to an automobile which had toppled off a hydraulic hoist while being serviced by plaintiff.

In *Root Motor Co. v. Mass. Bonding & Ins. Co.*, 187 Minn. 559, 246 N. W. 118 (1932), the exclusion involved was of "property of the assured, or property in the custody of the assured and for which the assured is legally responsible * * *" The facts were that a servant of the insured, while driving an automobile owned by a customer from the customer's home to the insured's garage, was involved in an accident and caused damage to the customer's car. The insured was held liable to the customer and action was subsequently initiated against the insurer. The court said: "The policy in so clear terms excludes from coverage loss to plaintiff on account of damage to a customer's car while in plaintiff's possession that there can be no claim of any ambiguity to be construed in favor of the insured."

In *Guidici v. Pacific Automobile Ins. Co.*, 79 Cal. App. 2d 128, 179 P. 2d 337 (1947), the exclusion involved was of "property owned by, rented to, leased to, in charge of, or transported by the insured." The facts were that a customer left his automobile at plaintiff's garage to be re-

paired. In the course of the repairs the car was damaged by fire. Defendant refused to defend the claim and plaintiff brought action on the policy. The court said: "The crux of appellant's argument is found on p. 12 of the opening brief: 'It is submitted that in order to have the property "in charge of" the garage, the garage owner must not only have the right to exercise dominion over the property, but must, at the time it is damaged, be actually doing something to the property itself.' We cannot follow appellant in this refinement of reasoning. A bailee of property is in charge of it so long as he retains actual possession whether he is operating it or working on it or not."

In *Vaughn v. Home Indemnity Co.*, Ga. App. 196, 71 S. E. 2d 111 (1952), the exclusion involved was of property "owned by, rented to, in charge of or transported by the insured." An automobile was damaged by fire while being repaired by the insured. The court said: "The plaintiff had custody of and control and dominion over the automobile at the time of its destruction so as to render him 'in charge of' it and so as to bring it under exclusion (i) of the policy."

Other cases to the same effect are: *Clark Motor Co. v. United Pacific Ins. Co.*, 172 Ore. 145, 139 P. 2d 570 (1943); *Speris v. Ayling*, 158 Pa. Superior Ct. 404, 45 A. 2d 385 (1946); *Aetna Casualty & Surety Co. v. Patton*, 247 Ky. 370, 57 S. W. 2d 32 (1933). None of these cases have required a proprietary interest in the insured in order to make the exclusion effective.

CONCLUSION.

It is submitted that the intent of the parties, as clearly expressed in their agreement, sound reasoning, Illinois law as well as the decision of the Second Circuit and the overwhelming weight of authority elsewhere, all require this Court to conclude that, since the grinder was in the care, custody or control of Foster at the time it was damaged, it was expressly excluded from the coverage of the policy and there is, therefore, no liability on the part of Hartford to Foster. A writ of certiorari should, therefore, issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

FRANCES E. SHIELDS,
THOMAS E. COMBER, JR.,
Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,232

McLOUTH STEEL CORPORATION,
Plaintiff

v.

MESTA MACHINE COMPANY,
Defendant

and

J. M. FOSTER AND J. H. JOHNSON, AS INDIVIDUALS AND AS PARTNERS TRADING AS J. M. FOSTER & CO.
Defendants and Third-Party Plaintiffs-Appellees

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Third-Party Defendant-Appellant

and

LANDIS TOOL COMPANY,
Third-Party Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 1, 1954

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 23, 1954.)

By HASTIE, *Circuit Judge.*

Mesta Machine Company, a Pennsylvania corporation, contracted to install a large roll grinder in the Michigan plant of McLouth Steel Corporation, a Michigan corporation. Mesta subcontracted the work of installation to J. M. Foster & Co., an Indiana partnership. While Foster's employees were installing the machine it fell and was severely damaged. McLouth sued Mesta. Mesta cross-claimed over against Foster on Foster's undertaking to save Mesta from liability arising out of the work. Foster joined two third-party defendants, Landis Tool Co., the original vendor of the machine, and Hartford Accident and Indemnity Co., Foster's insurer, who is the present appellant.

The district court imposed liability upon Foster and its insurer, finding (1) that Mesta was not negligent in any respect, (2) that Landis, whose expert was present when the accident occurred, was not in such control as would render it liable therefor, (3) that the accident was attributable to the negligence of Foster.

The policy of insurance issued to Foster by Hartford bound the insurer "To pay on behalf of the Insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." However, the policy listed several exclusions from coverage among which was ". . . property owned, occupied or used by . . . [or] in the care, custody or control of the Insured." The sole question here is whether that exclusion is applicable to the circumstances of this mishap.

Federal jurisdiction in this case is based solely upon diversity of citizenship. Hence, Pennsylvania choice of law rules control this adjudication in a United States court for a Pennsylvania district. *Klaxon Co. v. Stentor Electric Manufacturing Co. Inc.*, 1941, 313 U. S. 487.

The law of Pennsylvania is clear that where a policy of insurance requires countersigning by an out-of-state

agent before the contract is complete, particular provisions are to be given effect according to the law of the place where the document is countersigned. *Hardiman v. Fire Ass'n of Phila.*, 1905, 212 Pa. 383, 61 Atl. 990; *Wooten Hotel Corp. v. Northern Assur. Co.*, 3 Cir. 1946, 155 F.2d 988; cf. *Ruhlin et al. v. New York Life Ins. Co.*, 3 Cir. 1939, 106 F.2d 921. This is but a specific application of the accepted general rule that the nature and extent of the duty and obligation imposed by a contractual undertaking are determined by the law of the place of contracting. *Marcus v. Heralds of Liberty*, 1913, 241 Pa. 249, 88 Atl. 678; *Long v. Morris*, 3 Cir. 1942, 128 F.2d 653; *Sheinman & Sons, Inc., v. Scranton Life Insurance Co.*, 3 Cir. 1942, 125 F.2d 442; See, RESTATEMENT OF CONFLICTS, §§ 332(f), 346; 1 COUCH ON INSURANCE §§ 194, 198.

The policy in the present case was by its terms not binding until countersigned by an authorized agent. This was done in Chicago, Illinois. Therefore, we look to the law of Illinois for the solution of our problem.

The district court relied, correctly we think, upon *Welborn v. Illinois Nat. Cas. Co.*, 1952, 347 Ill. App. 65, 106 N.E.2d 142, as expository of present law in that state. That case involved an insurance policy issued to a garage owner covering bodily injury or property damage suffered through operation of the garage. The policy excluded property, "owned by, rented to, in charge of, or transported by the insured." The Appellate Court of Illinois for the Fourth District affirmed a recovery on the policy for a loss suffered through destruction of an automobile left with the insured for repair. The question was whether the insured was "in charge of" the car. The court conceded that the insured was in a sense in charge of the property, but held that he was not "in charge" of it within the meaning of the exclusionary provision of the policy. It reasoned that the exclusionary provisions were limited to a proprietary type of control, though temporary, and did not cover the possessory handling which is incidental to repair. Almost anticipating the circumstances of the present case

the court stated that its reasoning was "not limited to a car," but was "equally applicable to a machine or equipment." We think the Illinois court would have reasoned the same way and would have reached the same conclusion had the present contract and circumstances been before it.

The appellant has attempted to minimize the *Welborn* case as a decision of a court of intermediate appeal, arguing that such a decision is of very limited authority in Illinois. But the decision is not on that account any less binding on a federal court charged with applying Illinois law. *Fidelity Union Trust Co. et al., Executors, v. Field,* 1940, 311 U. S. 169; *Six Companies v. Highway District,* 1940, 311 U. S. 180; *West v. American T. & T. Co.,* 1940, 311 U. S. 223. The cited cases make it clear that, where state law governs, a federal court may not decline to accept the rule announced in a state decision merely because it has not received the express or implied approval of the highest court of the state. This is so even though the federal court may think it likely that the highest state court will overrule the intermediate decision as unsound at some later date, or that another intermediate appellate court will reach a contrary result. It is also immaterial that the federal court may think the rule wrong, or prefer another. "An intermediate state court in declaring and applying the state law is acting as an organ of the State, and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Union Trust Co. et al., Executors v. Field, supra.* Compare *Turner v. Alton Banking & Trust Co.,* 8 Cir. 1950, 181 F.2d 899, holding a decision of the Appellate Court of Illinois declarative of state law.

In the present case, though a rational argument can be made for a different result,[1] we recognize our obligation to follow and apply the law of Illinois as declared in the *Welborn* case.

The judgment will be affirmed.

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1 See Hardward Mutual Casualty Co. v. Mason-Moore Tracey, Inc., 2 Cir. 1952, 194 F.2d 173.

McLAUGHLIN, *Circuit Judge,* dissenting:

No time need be spent in endeavoring to prove or disprove that the Welborn decision is to be accepted as the law of Illinois. Assuming that it is the case has no application here. The policy in Welborn was for garage liability. It specifically included in its coverage the use of the designated premises "[f]or the purpose of an automobile dealer or repair shop, and all operations either on the premises or elsewhere which are necessary and incidental thereto, including repairs of automobiles or their parts * * *." A later exclusion clause stated that the coverage did not extend "[t]o property owned by, rented to, in charge of, or transported by the Insured." In that matter while a gas tank was being removed from a customer's car by a garage employee the gas ignited causing damage to the automobile. The garage was held responsible for the damage and claimed that the occurrence was within its above policy. The court upheld that contention on the theory that, as it stated, "The precise wording of the general exclusion provision appears to be in direct conflict with the specifically defined operations which are declared covered."

That is not the situation before us. The policy at issue is one for a contractor's liability. It generally covered "[a]ll sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." It went on to state its particular exceptions to that general coverage and specifically excluded "[p]roperty in the care, custody or control of the Insured."

The Welborn principle that explicit coverage cannot be avoided by later general exclusion does not solve our problem. What we have is a policy that starts off with a general statement of coverage and then follows with certain carefully stated exceptions. There is no ambiguity about the document in whole or in part. The Illinois law on that sort of policy language is in accord with the firmly settled

doctrine that it must be construed as it plainly reads.[1] Nor can the Welborn court's interpretation of the phrase "in charge of" be taken from the restrictive pattern presented by the facts there to control the utterly different circumstances of the issue before us where instead of a risk being specially assumed it is specially excluded.

There is nothing mysterious about the policy in suit. The insured received what it paid for. If it had desired further protection it could have readily obtained that for a further commensurate premium. The policy is the insured's contract, clear on its face. The coverage now sought was distinctly eliminated from the agreement the insured purchased because that kind of insurance was not included for the premium paid. That is the plain intent of the policy as gathered from its four corners. This action is based solely on that complete unambiguous contract. It offers no excuse for going off the agreement; certainly not for speculation as to what kind of insurance Foster would want. The only other reason for the decision of the district court, now affirmed, was its reliance upon the Welborn opinion giving an ownership status to the phrase "in charge of". As already indicated, I think it sound law that Welborn does not control this litigation and it is not only sound but salutary that the above connotation Welborn attempts to attribute to the "in charge of" phrase be confined to the Welborn type of insurance contract. The language of the suit policy "[i]n the care, custody or control of the Insured" instead of being so misinterpreted "[r]equires only that the insured be in control of the property actually injured * * *." Judge Augustus Hand, Hardware Mutual Casualty Co. v. Mason-Moore-Tracy, Inc., 194 F.2d 173 (2 Cir. 1952).

It was a forty-five ton grinder which was being moved not by its owner but by Foster, the expert called in for the

1 Zignick v. Burick, 395 Ill. 182, 69 N.E. 2d 888 (1946); Dempsey v. National Life & Accident Ins. Co., 404 Ill. 423, 88 N.E. 2d 874 (1949); Lentin v. Continental Assurance Company, 412 Ill. 158, 105 N.E. 2d 735 (1952).

purpose. The district judge concedes that Foster had physical possession of the grinder at the time of the accident. He had been hired to install it for the reason that he was skilled in that kind of task. But because he did not own the grinder the district court, upheld by the majority opinion, says that he did not control it. That is contrary to the fact, contrary to the ordinary definition of control quoted by appellee [2] and contrary to settled decisional law. The Hardware Mutual case above mentioned on its facts is very similar to the present issue; it should be persuasive. And see Speirs & Co. v. Underwriters at Lloyds, 84 Cal. App.2d 603, 191 P.2d 124 (1948); Guidici v. Pacific Automobile Ins. Co., 79 Cal.App.2d 128, 179 P.2d 337 (1947); State Automobile Mutual Ins. Co. v. Connable-Joest, Inc., 171 Tenn. 377, 125 S.W.2d 490 (1939); Root Motor Co. v. Mass. Bonding & Ins. Co., 187 Minn. 559, 246 N.W. 118 (1932); Vaughn v. Home Indemnity Co., 86 Ga.App. 196, 71 S.E.2d 111 (1952).

I think the judgment in favor of Foster and against Hartford should be reversed.

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2 "Power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer or oversee". Black's Law Dictionary, page 428.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

HARRIET G. HUMPHRYS,
Deputy Clerk.

June 23, 1954

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FILED
OCT 15 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954.

No. 347.

McLOUTH STEEL CORPORATION,
v. *Plaintiff,*

MESTA MACHINE COMPANY,
and *Defendant,*

J. M. FOSTER and J. H. JOHNSON, as Individuals and as Partners Trading as J. M. FOSTER & CO.,
Defendants and Third-Party Plaintiffs,
v. *(Respondents)*

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Third-Party Defendant-Appellant,
and *(Petitioner)*

LANDIS TOOL COMPANY,
Third-Party Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 347.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

(*Petitioner*),

v.

J. M. FOSTER AND J. H. JOHNSON, AS INDIVIDUALS AND AS PARTNERS TRADING AS J. M. FOSTER & CO.,

(*Respondents*)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 116 F. Supp. 689. The opinion of the United States Court of Appeals for the Third Circuit is reported in 214 F. 2d 608.

JURISDICTION.

The petitioner for writ of certiorari has indicated no substantial reason why the writ should be granted here.

The writ "will be granted only where there are special and important reasons therefor." Rule 19.

This controversy is between two private litigants, an insured against the paid insurer. Both the district court and the court of appeals decided that the insurance policy covered the liability insured against.

Although the petitioner attempted in the courts below to cast some doubt upon the matter, it is clear that the law of Illinois governed in the interpretation of the insurance policy. The district court and the majority opinion of the court of appeals relied upon a specific and cited Illinois court decision. In addition, the district court concluded that the policy covered the insured's liability "not only because that is the law of Illinois but because it represents a proper construction, in accordance with the intent of the contract."

The petitioner and the dissenting judge of the court of appeals contend that the cited Illinois decision has no application. Then, pointing to no contrary decision but relying solely on generalizations from other inapposite Illinois cases, they argue that a different result should have been reached.

Apparently, the petitioner seeks to bring its petition within the second clause of Rule 19(b) but no reason is stated as to why it is supposed that the court of appeals here has decided "an important state * * * question." Even the amount in controversy ($50,000) is scarcely such as to make this an important state question.

In the event the Court should conclude to consider the merits of the controversy sought to be brought up for review, the following is a more accurate statement of the

QUESTION PRESENTED.

1. Does petitioner's comprehensive property damage liability policy, issued to respondents, subcontractors specializing in installation of industrial equipment, cover its insured's liability for having negligently permitted a machine to drop, it appearing that the machine was in the owner's plant, subject to the direction and control of the owner and the general contractor, and about to be installed under the supervision of a representative of the machine's manufacturer?

STATEMENT OF THE CASE.

The petitioner, in its Statement of the Case (page 4), makes the very misleading statement that the district court found "that the roll grinder was in the control of Foster at the time of the accident." There is the same intimation in petitioner's Statement of the Questions Presented.

A more accurate statement of Judge Kirkpatrick's ruling is to be found in the following excerpt from his opinion (Pet. App. 24a):[1] "* * * just before the cables broke, the grinder as it hung * * * was physically in Foster's 'control'. * * * As a matter of fact, it was not nearly so much in Foster's control as was the automobile in charge of the repairman in the **Welborn** case [an Illinois decision in respondent's favor]. * * * Foster was merely installing the machine, that is, doing work upon it."

In order that the Court may fully understand all of the facts giving rise to the issue in the lower courts, it is necessary to supplement petitioner's Statement of the Case.

The Landis roll grinder was shipped to the McLouth plant and arrived on May 6, 1949 (33a). Upon arrival of the grinder, Foster employes were directed by representatives of McLouth to remove the grinder from the flat car upon which it was shipped and to store it in a plant area designated by McLouth (46a).

Following movement of the machine off the flat car, the grinder was stored in the McLouth plant and was moved 5 times more, as found by the district court, "always at the direction of either McLouth or McLouth's general contractor" (Pet. App. 24a).

---

1. Petitioner's Appendix contains pages 1a to 30a. Respondents' Appendix contains pages 31a to 80a. Wherever reference is made to Petitioner's Appendix, the page number will be preceded by the notation "Pet. App.". Wherever reference is made to the original record the page number will be preceded by the notation "N. T.".

Upon arrival of the Landis roll grinder, McLouth requested Landis to furnish an erector to supervise the installation of the grinder pursuant to its contract with McLouth (37a, 38a, 68a, 69a; Exhibits F8, F9, 79a, 80a, N. T. 389, 467). In response, Morganthall, an erector employed by Landis, was sent by Landis to the McLouth plant about July 11, 1949. Prior to his arrival, no attempt was made to install the Landis roll grinder (45a, 46a).

Morganthall was introduced to the Foster employes on the job as the erector of the Landis Tool Company in charge of the installation of the Landis roll grinder (59a, 67a). The riggers employed by Foster were instructed by the Foster superintendent to follow Morganthall's directions concerning installation of the Landis roll grinder (59a, 67a, 68a).

Immediately after Morganthall's arrival, Foster employes were directed to place the grinder on its foundation in order to level it (46a). The attempts which followed to install the grinder were unsuccessful and continued for 4½ weeks (63a).

However, despite all efforts, it was not possible to level the grinder due either to an imperfection in the machine or to some faulty procedure utilized in installation. After many unsuccessful attempts to install the machine, Morganthall returned to the Landis office in Detroit on August 5, 1949, and discussed the installation of the machine with Landis employes, returning to the plant on August 9, 1949 (49a, 63a).

When Morganthall returned to the plant, a meeting was held, representatives of Foster, McLouth, Mesta and Landis being present, and it was agreed that a further attempt to install the grinder should be made the next day and in this attempt Morganthall was to be given a free hand (40a-43a, 47a, 49a-51a, 55a, 65a; Exhibits F5, 77a, N. T. 389, 464).

Keane, an employe of Landis, who was also present at the August 9, 1949 meeting, in reporting to that company

concerning the meeting, wrote that on the following day Morganthall was to "have a free hand" in the installation of the machine (Exhibit F5, 77a, N. T. 389, 464). Morganthall stated in his report relating to the same meeting that the other parties agreed "to go along with him" (Exhibit F6, N. T. 389, 464).

On August 10, 1949, pursuant to the agreement reached at the meeting of the previous day, Foster employes were directed to move the grinder off its base (Pet. App. 24a). The grinder was lifted and while suspended in the air, the slings parted, dropping the grinder and seriously damaging it.

On the day of the accident, Morganthall had charge of the installation and movements of the machine pursuant to the discussions held on August 9, 1949. Morganthall had the only blueprint of the grinder that was on the premises and he located the wedges, adjusted them (76a) and supervised their installation (60a, 61a). Morganthall also directed that additional weight be placed on the foundation to level it (62a).

This case was tried by Chief Judge Kirkpatrick sitting without a jury. He found that the accident was caused by the negligence of Foster in using inadequate slings and in failing properly to inspect them. He accordingly found that Foster was liable to McLouth. He found further that Landis' expert Morganthall "was not in control of the rigging operation to the extent that would make Landis liable for the accident", and that Hartford was liable to Foster under its insurance policy. Chief Judge Kirkpatrick then entered judgments accordingly.

Hartford (petitioner) appealed from the judgment against it in favor of its insured, Foster, and the court of appeals for the third circuit, affirmed.

Argument.

I.

PRELIMINARY STATEMENT.

Foster and Hartford entered into an insurance contract covering liability for damage to property caused by Foster's negligence on the McLouth job, which policy provided that Hartford was

> "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

The sole question is whether Hartford is liable to Foster under this policy.

Hartford admits that the policy in the amount of $50,000 was validly entered into, that it covers the McLouth job, that except for exclusions it expressly covers damage to the machine here in question, and that proper and timely notice of damage and proof of loss were filed by Foster with Hartford. However, Hartford asserts that it is not liable because the policy does not apply.

> "(d) under coverage B, to injury to or destruction of (1) property owned, occupied or used by or rented to the Insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the Insured, or (3) any goods or products manufactured, sold, handled or distributed or premises alienated by the named Insured, or work completed by or for the named Insured, out of which the accident arises;"

Therefore, the courts below were presented with two questions: first, what is the meaning of the exclusion relied

on and, second, does the evidence bring this case within the exclusion.

It is fundamental, in considering these questions, that an exclusion provision in an insurance policy is to be read strictly against the insurer. To state the converse, if the language can be interpreted to favor the insured, it should be so interpreted: **The Insurance Companies v. Wright,** 68 U. S. 456 (1863); **Bull v. Sun Life Assurance Co. of Canada,** 141 F. 2d 456 (CA 7, 1944), cert. den. 323 U. S. 723 (1944); **Metropolitan Life Ins. Co. v. Bovello,** 12 F. 2d 810 (C. A. D. C. 1926).

II.

UNDER THE LAW OF ILLINOIS, THE EXCLUSION IS NOT APPLICABLE TO THE CLAIM OF FOSTER.

The trial court in its opinion concluded that the Illinois law governed the interpretation of the policy and that under the law of Illinois the exclusion provision was inapplicable. The court of appeals sustained both conclusions. Petitioner apparently concedes that Illinois law is controlling and that if the case of **Welborn v. Illinois Nat. Cas. Co.,** 347 Ill. App. 65, 106 N. E. 2d 142 (1952) is applicable, there is no merit in its position.

The insurance policy indemnifies the insured against liability for injury to or destruction of property. It then purports to exclude from its coverage property owned, occupied, used or rented by the insured, and property in the care, custody or control of the insured.

The obvious intention of the parties entering into the insurance contract was that property in which the insured had some interest should not be covered by the policy. Such a policy is clearly intended to provide coverage for damage to the property of others. The very thing which a contractor installing heavy machinery takes insurance for is to protect himself from liability for damage to the machinery on which he is going to work. It is difficult to follow the

logic of a contention that if Foster became liable in damages for having dropped the Landis grinder on the grinder's foundation, Hartford would be liable for the amount of damage to the foundation but not for damage to the grinder itself. Yet under Hartford's theory in this case, anything being lifted by Foster falls within the exclusion.

The Illinois decision, already mentioned, took the proper view of this kind of broad coverage in an insurance policy followed by exclusionary provisions. In **Welborn v. Illinois Nat. Cas. Co.**, 347 Ill. App. 65, 106 N. E. 2d 142 (1952), the facts were that the plaintiff operated a garage to which a third party brought a car for repairs. The car was damaged by fire while in the garage and plaintiff brought suit against his insurance carrier. The insurance policy provided that the insurer would pay such sums as the insured became legally obligated to pay because of liability arising out of

> " 'The ownership, maintenance, occupation, or use of the premises herein designated, including the public ways immediately adjoining, for the purpose of an automobile dealer or repair shop, and all operations either *on the premises* or elsewhere which are necessary and incidental thereto, *including repairs of automobiles* or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the *ownership*, maintenance, or use of any automobile for any purpose in connection with the above defined operations, and also for pleasure use.' " (p. 143)

The insurance company denied liability on the ground that the insurance policy excluded property "owned by, rented to, in charge of or transported by the insured."

The court held for the plaintiff on the ground that the policy itself by its general language, as does the policy in the present case, covered this situation. The exclusion was in conflict with the general provisions. While the court

conceded that the insured was in a sense "in charge of" the car, it held that the words "in charge of" should be construed as pertaining to "a status similar to ownership as distinguished from mere possession for repair operations". In other words, the language "in charge of" was read as meaning the same as "owned or leased by." So construed, the coverage applied to the insurer's liability for property of another while the exclusion pertains to his own personal loss for damage to his own property or that in which he has an interest.

The **Welborn** case is quite similar to the present case. In both, the insured was performing services on or with the property at the time it was damaged. In both, except for exclusions, the damage clearly fell within the coverage of the policy. In both, the exclusion provision relied upon by the insurance company provided specifically for the exclusion of property in which the insured had some interest in the nature of ownership and then contained broad language of exclusion such as "in charge of" or "in the care, custody or control of". The court in the **Welborn** case held that this broad language must be read along with the specific language and as part of it so that the purpose of the insurance contract would be preserved. The **Welborn** case is controlling here.

Judge Kirkpatrick in his opinion (Pet. App. 23a-25a) held that under the **Welborn** case (as well as under a proper construction, in accordance with the intent of the contract), the exclusion clause in the Hartford policy was inapplicable to Foster's claim. As he pointed out, Foster had no interest in the machine even remotely akin to ownership, and had less control than the insured in the **Welborn** case.

The petitioner made much of the fact that the **Welborn** case involved a garageman's liability policy while this case is concerned with a contractor's liability policy. There is no logical ground for distinguishing between the two, and in fact the Illinois court in the **Welborn** case stated that its reasoning was not "limited to a car" but was "equally ap-

plicable to a machine or equipment". Furthermore, it is interesting to note that almost all of the cases from other jurisdictions relied upon by petitioner involve garagemen's policies. The only conclusion to be drawn from this is that the law of Illinois is in fact different from the law in these other jurisdictions.

Were the exclusion clause and the word control to be given the meaning which Hartford urges, it would, in effect, completely abrogate the insurance coverage. If it were to be held that the exclusion clause is applicable where any diluted *indicia* of control are present in the insured, there would be little or no reason for a contractor to take out such a property damage policy since the chief protection sought by a contractor moving expensive machinery is protection against damage to that machinery. And such damage is most likely to happen while the machine is being handled or worked upon.

Clearly, when Foster's employes were not actually lifting the machine, all *indicia* of control were absent. It would be ridiculous to establish a rule that if Foster dropped the machine, the insurance company would not be responsible, but if Foster dropped something else on the machine which was sitting on its base, then Hartford would be responsible for damage to the machine. Yet this is the rule for which Hartford contends.

III.

THE GRINDER WAS NOT IN THE CARE, CUSTODY OR CONTROL OF FOSTER AT THE TIME OF THE ACCIDENT.

The trial court did not find as stated on page 4 of the petitioner's brief that the grinder was in the "control" of Foster. The court stated that the "rigging operation" was not under the control of Morganthall "to an extent that would make Landis responsible for the accident."

Further, the court stated that Foster had physical control of the grinder at the time of the accident in the sense only that it was "able to swing it right or left or to lift it or set it down." The court then proceeded to point out the more important general control resting in McLouth as owner and in McLouth's general contractor. Judge Kirkpatrick compared Foster's role to that of a repairman working on a refrigerator in a private home. He concluded that it had not been the intention of the parties to the insurance contract to exclude Foster's liability in this case (Pet. App. 22a, 24a).

It is clear from the evidence that the trial court's holding is correct.

The important question is not who had control of the manner of lifting the grinder or who owned or had control of the slings, crane, or blocking with which the grinder was lifted. The vital question here is who had control of the **grinder** itself within the meaning of the policy.

The evidence makes it quite clear that McLouth and Landis had this control. McLouth owned the grinder and the building in which it was located, and accordingly had all of the rights of control concomitant with ownership. The grinder was being installed as directed by McLouth. It is quite clear that at any given moment, McLouth as owner could declare that the grinder be placed in another location, picked up, set down or, for that matter, that it be not moved at all. Moreover, McLouth could have interrupted any of these operations at any point.

In addition, the testimony shows clearly that the Landis erector Morganthall had been sent to the McLouth plant, his agreed duties being to supervise the installation of the grinder. Former employes of Foster testified that they had been directed to obey Morganthall's orders as to what was to be done with the grinder itself. When either McLouth or Morganthall wanted the grinder lifted or moved, it was lifted or moved.

The question of who owned or had control of the slings and blocking is, for this purpose, completely irrelevant. The slings and blocking had to do only with the lifting or moving of the machine, **if McLouth or Morganthall ordered it lifted or moved.**

In view of all of this, the exclusion provision in the Hartford policy can have no effect. The courts have interpreted the word "control" to mean management or superintendence. **In Re Lyman,** 55 Fed. 29, 40 (S. D. N. Y. 1893); **Bates v. Connecticut Power Co.,** 130 Conn. 256, 33 A. 2d 342 (1943); **Cohen & Powell, Inc. v. Great American Indemnity Co.,** 127 Conn. 257, 16 A. 2d 354 (1940); **Black's Law Dictionary** page 280, 428, 493.

Foster's crew of riggers and Foster's crane operator were called in under the direction of those in charge of the machine to lift it where and when these persons wished it lifted. Morganthall was expressly given the duty of superintending the operation. McLouth, in actuality, was the governing power. Therefore, it cannot be said that the grinder was in the care, custody or control of Foster; Foster at most had care, custody and control only of the instruments with which the grinder was lifted.

In this light, there can be no question but that the exclusion provision is inapplicable.

The evidence and the applicable law not only justified but required the decision of the trial court in this case, which decision in addition is in conformity with the intention of the parties.

IV.

THE CASES RELIED UPON BY PETITIONER IN OTHER JURISDICTIONS ARE NOT PERTINENT.

Petitioner discusses several cases in other jurisdictions which it contends support its position. As pointed out above these cases have no relevance here since the matter is to be decided under Illinois law which is contrary to

petitioner's position. However, these cases do not, in any event, support the petition in this case.

In the case of **Speirs v. Underwriters at Lloyd's London,** 84 Cal. App. 2d 603, 191 P. 2d 124 (1948), an automobile was left at the insured's place of business for repair and was damaged. The insurance policy contained a $5,000 deductible provision for liability arising out of ownership, operation, maintenance or control of any automobile. The court found that "plaintiff had complete possession of and power and authority to manage" the damaged vehicle and therefore concluded that the deductibility provision was applicable. That decision has no application for the reason that complete possession, power and authority to manage the grinder were not in Foster. Such possession, power and authority to manage were in McLouth or Landis. In addition, the insured in the **Speirs** case was a bailee of the property, a relationship which is entirely lacking here.

State Automobile Mut. Ins. Co. v. Connable-Joest, Inc., 171 Tenn. 377, 125 S. W. 2d 490 (1939), is readily distinguishable for the same reasons. There again the court found that the automobile was "in the **complete** power and control of the plaintiff", and again the court found that the insured was a bailee of the property. An insured occupying such a position might be considered to fall within the test set forth by Judge Kirkpatrick, that the exclusion would apply only to any proprietary interest in property "used by the insured in his possession under any and every kind of arrangement regardless of the various shades of interest running from full ownership to the barest custody".

The balance of the cases cited by petitioner are similar in their facts and similarly distinguishable. The case of **Aetna Casualty & Surety Co. v. Patton et al.,** 247 Ky. 370, 57 S. W. 2d 32 (1933), is not in point at all since it involved

a truck which was damaged while rented by the insured, who owned it, to a third party. Since the insured was the owner of the property the case is obviously not contrary to the decisions of the courts below.

All of these cases involve bailees of property which was damaged while in their exclusive possession and control and while on their premises. This is obviously not the case here. While we contend that the damaged grinder in this case was not in the care, custody or control of Foster at the time of the accident, we contend further that even if Foster be deemed to have had some control of the grinder, recovery would not be precluded here under the decisions cited by petitioner. For, as indicated, all of these cases involved damage to property in the exclusive possession and control of the insured and a bailment relationship existed. The grinder in this case was clearly subject to the control of McLouth and Landis, and no bailment was involved.

The petitioner relies heavily upon **Hardware Mut. Cas. Co. v. Mason-Moore-Tracy, Inc.**, 194 F. 2d 173 (C. A. 2, 1952). Again, that case is clearly distinguishable. Recovery was there sought, not for damage to the machine being moved, but for damage **to the instrument doing the moving**, i.e., the elevator. The insured contended that the exclusion was inapplicable solely because it did not have control of the whole building. The court said that the important element was "control of the property actually injured, i.e., the elevator".

There was no finding that the machine being carried from one floor to the other was in the care, custody and control of the insured. The elevator itself which the insured was operating and which was moved in accordance with its directions could be said to be under its control. That is quite different from the situation in this case.

As to the exclusiveness of control, the court in the **Hardware Mutual** case held that as the insured was using

the elevator and had complete control of its motion at the time of the injury, it did not matter that at some other time someone else might have had this control. This is also quite different from the case here.

Therefore, the cases cited by the petitioner do not represent the law of Illinois and in addition thereto are on their facts not in point.

CONCLUSION.

It is submitted that Hartford is liable to Foster in accordance with the terms of its insurance contract, under the governing law of Illinois, and under the general law. In addition, no good reason has been advanced as to why the petition should be granted. The Petition for Certiorari should therefore be denied.

Respectfully submitted,

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